Supreme Court, U.S.
FILED
SEP 23 1991
OFFICE OF THE CLERK

No. 91-125

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANK ACIERNO, PETITIONER

v.

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF CONTENTS

	Page
Appendix A	1a
Appendix B	5a
Appendix C	7a
Appendix D	8a
Appendix E	9a

TABLE OF AUTHORITIES

Cases:

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	6
Tuley v. *Heyd*, 482 F.2d 590 (5th Cir. 1973)	7

Constitution, statutes and rules:

U.S. Const. Amend. V	2
Federal-Aid Highway Act of 1966, 23 U.S.C. 138	2, 5, 6
National Environmental Policy Act of 1969, 42 U.S.C. 4331(C)	2, 5
Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4651	2, 5
28 U.S.C. 455(a)	3
42 U.S.C. 1981	2, 5
Fed. R. Civ. P.:	
Rule 12(b)(6)	5, 6
Rule 56	4

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-125

FRANK ACIERNO, PETITIONER

v.

SAMUEL K. SKINNER,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

The petition for a writ of certiorari seeks review of an order of the United States Court of Appeals for the Third Circuit (Pet. App. A3-A4) summarily affirming the district court's dismissal of this action. Petitioner contends that the district court erred in (1) dismissing two counts of his complaint on grounds of laches and (2) restricting the scope of discovery.

The district court fully set forth the factual and legal considerations relevant to its laches determination and decided the issue correctly. Pet. App. A12-A19. We rely on the court's explication of that holding.

With respect to petitioner's contentions (Pet. 10-12) regarding discovery, the district court rulings

that petitioner challenges are not reproduced in the appendix to the petition; nor are they adequately described in the petition. We therefore have reproduced the pertinent rulings in the appendices hereto.

Petitioner contends (Pet. 11) that the district court improperly granted summary judgment "on the merits" of his complaint without affording him sufficient opportunity to conduct discovery on the merits. That contention is incorrect. The court dismissed the complaint based on issues that were fully briefed and argued following adequate opportunity for discovery.

1. Petitioner filed this suit in March 1990 to challenge a federally funded highway project in Delaware, part of which took a portion of petitioner's land. Petitioner's complaint, filed in the United States District Court for the District of Delaware, alleged that the state or federal respondents, or both, had violated the Federal-Aid Highway Act of 1966, 23 U.S.C. 138 (Count 1) [hereinafter, the "Section 4(f) claim"]; the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4331(C) (Count 2); the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4651 (Count 3); petitioner's rights under the Fifth Amendment and under 42 U.S.C. 1981 (Count 4); and various state environmental statutes (Count 5). Reproduced Record (R.R.) 163a-179a.

In May 1990, the federal and state respondents filed dispositive motions. The federal respondents moved for summary judgment in their favor on the ground that petitioner's entire suit was barred by laches. R.R. 247a. As to Count 1, the Section 4(f) claim, they sought summary judgment on the additional ground that the undisputed facts established compliance with Section 4(f). The federal respond-

ents also moved to dismiss Counts 3 through 5, among other reasons, for failure to state a claim and lack of subject matter jurisdiction. R.R. 249a-250a. The state respondents likewise moved for summary judgment based on laches and on count-specific grounds. District Court Clerk's Record (C.R.) 39-40.

Judge James Latchum, the district court judge initially assigned to this case, issued a scheduling order in conjunction with the filing of respondents' motions. Judge Latchum's order set a date for argument on the motions and authorized "discovery related to the motions to be argued." R.R. 226a.

Shortly thereafter, petitioner filed a motion for recusal of Judge Latchum. On May 21, 1990, Judge Latchum issued an order and opinion recusing himself pursuant to 28 U.S.C. 455(a). C.R. 36; App., *infra*, 1a-6a. In a memorandum to Chief Judge Joseph Longobardi, Judge Latchum noted that petitioner had also requested that the case be assigned to a judge from outside the district, a request over which Judge Latchum had no authority. App., *infra*, 7a. The case was reassigned to Chief Judge Longobardi. C.R. 37; App., *infra*, 8a.

2. At a status conference on May 29, 1990, Chief Judge Longobardi denied petitioner's request that the case be referred to the Chief Judge of the Court of Appeals for reassignment to a judge from outside the district. R.R. 406a-409a. Petitioner made no further effort to have the case heard by a different judge. Judge Longobardi also adopted Judge Latchum's prior order permitting discovery only on the issues raised in respondents' pending motions. R.R. 434a-436a; App., *infra*, 10a-12a. In response to petitioner's claim that the prior order was unduly restrictive, Judge Longobardi made clear that he would

consider that claim "very closely" if it were submitted in writing and supported by affidavit, as provided in Fed. R. Civ. P. 56. R.R. 434a; App., *infra*, 10a. Petitioner did not pursue the court's invitation to file a written request for modification of the discovery order.

At a hearing on petitioner's application for a temporary restraining order in June 1990, Judge Longobardi reiterated his willingness to allow petitioner adequate discovery to respond to the pending motions and to enlarge Judge Latchum's prior order if petitioner requested it:

> With regard to the scope of discovery, discovery is limited to dealing with the issues raised by the parties. Obviously, briefing on the issue is designed to bring to the Court all of the information available by the plaintiffs [*sic*] which might be pertinent in response to the defendants' motions. Discovery after that time would serve no useful purpose either to the Court or to the plaintiffs.
>
> Under these circumstances, the discovery will be cut off sometime prior to the filing of the brief on June 11.
>
> *However, upon request of the plaintiffs, the Court would give them additional time to conduct discovery and thereby move the oral argument date from June 20 to some later time.*

C.R. 52, at 14; Supp. R.R. 32 (emphasis added); App., *infra*, 15a. Subsequent to that ruling, Judge Longobardi again declared that he would have willingly expanded discovery if petitioner had asked. Pet. App. A28 (the court "was perfectly willing to allow [petitioner] additional time in which to conduct discovery on all of the issues raised in [respondents'] motions").

In light of the proceedings below, petitioner's present contention (Pet. 11) that he was denied adequate discovery is unpersuasive. Petitioner was given repeated opportunities to expand the scope of the original discovery order, but he failed to avail himself of those opportunities.

3. Petitioner errs in asserting (Pet. 11) that the court's ruling on respondents' motions "expanded * * * beyond the limited scope of discovery and issues * * * established [by the court]." As discussed above, the discovery order expressly permitted discovery on all issues raised in the motions. Furthermore, the decision dismissing petitioner's complaint was based solely on the grounds set forth in the motions.

The court granted summary judgment on Counts 1 and 2—the Section 4(f) and NEPA claims—on grounds of laches. Pet. App. A12-A19, A30. As an alternative basis for granting summary judgment on Count 1, the court ruled in favor of respondents on the merits. *Id.* at A19-A25. In dismissing Count 3, the claim based on the Uniform Relocation Assistance and Real Property Acquisition Policies Act, the court agreed with respondents' argument that the statute does not create a private cause of action. *Id.* at A25-A26. The court likewise adopted respondents' position in holding that Count 4—alleging violations of due process and equal protection by the federal respondents and a violation of 42 U.S.C. 1981 by the state respondents—failed to state a claim against any of the respondents and therefore had to be dismissed under Fed. R. Civ. P. 12(b)(6). Pet. App. A26-28, A32-A35. Having dismissed all of the federal claims, the court declined to exercise pendent jurisdiction over, and accordingly dismissed, the state-law claims in Count 5. *Id.* at A29.

Thus, contrary to petitioner's assertion (Pet. 11), the court did not adopt an "expanded theory" in dismissing the complaint. Nor were "all of petitioner's environmental claims" dismissed "on the merits," as petitioner asserts (*ibid.*). The court addressed the merits only as an alternative basis for dismissing petitioner's Section 4(f) claim in Count 1. That determination did not "expand" the issues previously framed in the case, since the federal respondents had sought summary judgment on the merits of Count 1. See C.R. 38, at 16-19. In any event, the court properly based its review of the Section 4(f) claim on the administrative record, which was made part of the record in the district court. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 402 U.S. 401, 420 (1971).

4. Finally, there is no merit to petitioner's assertion (Pet. 11-12) that the court improperly " 'conver[ted]' * * * respondent's motions under Fed. R. Civ. P. Rule 12(b)(6) into motions for summary judgment." Notwithstanding the breadth of that assertion, the court treated respondents' Rule 12(b)(6) motions as motions for summary judgment in only one instance. The Court granted summary judgment in favor of the federal respondents on Count 4 (alleging constitutional violations) as an alternative disposition to its primary holding that Count 4 failed to state a claim. Pet. App. A34-A35. That alternative disposition was entirely proper. Petitioner presented no evidence or allegations to support his claim under Count 4, and he failed to rebut in any way an affidavit (C.R. 38, Exh. 3; Supp. R.R. 9-11) submitted by the federal respondents on the issue. Because respondents' Rule 12(b)(6) motion thus presented "matters outside the pleading" with respect

to Count 4, it was proper for the court to treat the motion as it did. See, *e.g.*, *Tuley* v. *Heyd*, 482 F.2d 590, 592-593 (5th Cir. 1973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1991

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150-JLL

FRANK E. ACIERNO, individually
and as Trustee ad litem for
Residents and Tenants, PLAINTIFF

v.

SAMUEL SKINNER, individually and in his capacity as Secretary, U.S. Department of Transportation, JOHN DAVIS, individually, and in his capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, individually and in his capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, individually and in his capacity as Federal Highway Administrator; RONALD C. CARMICHAEL, individually and as delegee, Federal Highway Administrator, DEFENDANTS

and

ALBERT H. MARTA, DEFENDANT-INTERVENOR

MEMORANDUM OPINION

Wilmington, Delaware

May 21, 1990.

LATCHUM, Senior District Judge.

This action is a broad based challenge to the completion of construction of relocated Delaware Route 7 connecting Route 13 to I-95. The planning and steps taken toward the three-phase construction of the new highway had its beginnings at least as early as 1985. Some portions of the highway have been completed. Plaintiff's complaint, which seeks to enjoin construction of a portion of Route 7, was filed on March 29, 1990. (Docket Item ["D.I."] 1.) At the same time plaintiff moved for a temporary restraining order ("TRO"). (D.I. 4.) Because the undersigned was acting as "Duty Judge" for this Court during the week of March 26, 1990, the case was assigned to that judge. Local Rule 2.2(C)(1). On the representation of plaintiff's attorneys that all other parties had been notified, the undersigned judge held a TRO hearing on March 29, 1990, and denied that motion. (*See* D.I. 8.) Before the time for defendants to appear and file answers, plaintiff again moved for a preliminary injunction and leave to take depositions. (D.I. 13 & 14.) Because of the need to expedite these proceedings and to resolve promptly obvious problems with the then posture of the pleadings, the Court on April 19, 1990, scheduled a Rule 16 Scheduling conference for May 7, 1990. (D.I. 16.)

As a result of discussions and comments of counsel at that conference, the Court entered a Preliminary Rule 16 Scheduling Order on May 7, 1990. (D.I. 21.) That order, in substance, (a) permitted the intervention of Albert H. Marta as a defendant; (b) set an expedited schedule for defendants to file answers, motions and an administrative record; (c) established a briefing schedule on all motions; and (d) set oral

argument thereon at 10:00 a.m., June 20, 1990. (*Id.*).

On May 17, 1990, plaintiff filed a motion to recuse the undersigned judge from presiding over any further proceedings in this case on the grounds that: (1) the undersigned judge had previously represented the Delaware State Highway Department before his appointment to the bench; (2) that the undersigned judge, before assuming the bench, had advocated, in other matters on behalf of the Delaware Highway Department, the same position as defendants advocate here; and (3) that the undersigned judge because of his earlier representation of the Delaware Highway Department and his relationship to counsel has a personal bias of the present matter because he did not reveal that he had once represented the Delaware Highway Department before the scheduling conference. (D.I. 34 & Ex. at 22-23.)

It is correct that the undersigned judge was appointed attorney for the Delaware Highway Department for New Castle County in 1948 and served as such until 1950. He also served as attorney for the Delaware Interstate Highway Division from August 17, 1955 to February 6, 1963, and as attorney for the Delaware River and Bay Authority from February 6, 1963 to August 21, 1968. All of this is public information, which appears and has appeared for many years in biographical sketches of the undersigned judge.[1]

However, this judge has no recollection that he has ever met defendant John Davis or ever had any dealings with him in any capacity or any other defendant

---

[1] *See, e.g.*, Who's Who in America; Who's Who in the East; Almanac of the Federal Judiciary; Judicial Staff Directory; Who's Who in American Law; Judges of the United States.

named in this action. Furthermore, the Court has never, prior to this suit, met or had any dealings with the plaintiff in this action.

Of course, this judge personally knows plaintiff's and defendants' attorneys because all of them have appeared before him as a judge in other matters. This judge has no recollection of retaining Aubrey B. Lank, Esq., as a special counsel before assuming the bench in any matter involving the Delaware State Highway Department, and has no recollection of advocating on behalf of the Delaware Highway Department the same defense as defendants are advocating here. All of this, if it ever occurred, was more than twenty-one years ago. But be that as it may, the present motion to recuse under 28 U.S.C. § 455(a) requires a judge to voluntarily disqualify himself "in any proceeding in which his impartiality might reasonably be questioned."

Most authorities which have considered the issue have held that even if no bias or prejudice of a judge may actually exist, it is enough to disqualify him if there be the mere appearance of some partiality. Limeco, Inc. v. The Division of Lime, 571 F.Supp. 710, 711 (N.D.Miss. 1983). Thus, to say that one has no recollection of any bias, and subjectively believes there is none, does not justify refusing voluntary disqualification. Accordingly, to eliminate any possible question of the appearance of partiality, the plaintiff's motion to recuse will be granted.

The undersigned stands recused and will request that this case be assigned to another judge who will be required, depending on the new judge's court schedule, to either go forward with, or reset the date for, oral argument on the motions now being briefed.

An Order in conformance with this Memorandum Opinion will be entered.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
– FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150-JLL

FRANK E. ACIERNO, individually
and as Trustee ad litem for
Residents and Tenants, PLAINTIFF

v.

SAMUEL SKINNER, individually and in his capacity as Secretary, U.S. Department of Transportation, JOHN DAVIS, individually, and in his capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, individually and in his capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, individually and in his capacity as Federal Highway Administrator; RONALD C. CARMICHAEL, individually and as delegee, Federal Highway Administrator, DEFENDANTS

and

ALBERT H. MARTA, DEFENDANT-INTERVENOR

ORDER

For the reasons stated in the Court's Memorandum Opinion entered in this case on this date, it is

ORDERED that plaintiff's recusal motion is hereby granted and the undersigned stands recused and will request this case be assigned to another judge.

Dated: May 21, 1990.

/s/ James L. Latchum
United States District Judge

APPENDIX C

MEMORANDUM DATE: May 21, 1990

TO: Chief Judge Longobardi

FROM: Judge Latchum

RE: Acierno v. Skinner et al., C.A. No. 90-150-JLL

I enclose a Memorandum Opinion and Order entered today in the above case in which, upon plaintiff's motion, I have recused myself from further proceedings in this matter. Therefore, I request that the case be assigned to another judge.

I point out that plaintiff's recusal motion also requests the assignment of another judge from outside this district—a request over which I have no authority.

In addition, I call your attention to the fact that this case is moving on an expedited track at plaintiff's urging. The parties are in the midst of briefing several outstanding motions including plaintiff's motion for a preliminary injunction. There is an outstanding Rule 16 Scheduling Order setting oral argument on all motions to be heard on *June 20, 1990, at 10 a.m.* When the case is assigned to a new judge, a determination will have to be made by the new judge whether the scheduled oral argument shall proceed on that date and that, of course, will depend on the new judge's existing calendar schedule.

md.

cc: Stephen B. Potter, Esq.
Kent A. Jordan, Esq.
Frederick H. Schranck, Esq.
Stephen E. Herrmann, Esq.
J. R. McAllister, Jr., Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150 LON*

FRANK E. ACIERNO

v.

SAMUEL SKINNER
JOHN DAVIS
MANUEL MARKS
THOMAS D. LARSON
RONALD C. CARMICHAEL

NOTICE OF REASSIGNMENT OF JUDGE

Please note that the above case has been reassigned from Judge Latchum to Judge Longobardi.

/s/ J. R. McAllister, Jr.
Clerk

Date: May 25, 1990

To: The Honorable Joseph J. Longobardi
The Honorable James L. Latchum
Stephen B. Potter, Esq.
Kent A. Jordan, Esq.
Frederick H. Schranck, Esq.
E. Norman Veasey, Esq.
Statistical clerk

---

* When filing papers, please include the initials of the Judge assigned to the case.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150 (JLL)

FRANK E. ACIERNO, Individually and as Trustee ad litem for Residents and Tenants, PLAINTIFF

v.

SAMUEL SKINNER, Individually and in his capacity as Secretary, U.S. Department of Transportation; JOHN DAVIS, Individually and in his capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, Individually and in his capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, Individually and in his capacity as Federal Highway Administrator; RONALD C. CARMICHAEL, Individually and as Delegee, Federal Highway Administrator, DEFENDANTS

Wilmington, Delaware
Tuesday, May 29, 1990
2:15 o'clock, p.m.

Before: HONORABLE JOSEPH J. LONGOBARDI, Chief Judge

Appearances:

POTTER, SPILLER, CROSSE & LEONARD
By: STEPHEN B. POTTER, ESQ.

-and-

SUGARMAN & ASSOCIATES,
By: ROBERT J. SUGARMAN, ESQ.
(Philadelphia, Pennsylvania)
Counsel for Plaintiff

FREDERICK H. SCHRANCK, ESQ.
Delaware Department of Transportation
Counsel for Defendant Davis

KENT A. JORDAN, ESQ.,
Assistant United States Attorney
Counsel for Federal Defendants

Also Present:

RICHARDS, LAYTON & FINGER
By: STEPHEN E. HERRMANN, ESQ.
For Intervenor/Defendant Albert Marta

* * * * *

[40] I want to deal now with the business about discovery.

You are under the impression that you were limited in your discovery. Apparently the order doesn't do that.

MR. SUGARMAN: The discovery limits me to the laches issue and to the other defendant motions to be argued on June the 20th. I specifically asked Judge Latchum to permit me to have discovery with regard to the merits, and he specifically refused it.

THE COURT: Do you want some discovery on the laches and other motions?

MR. SUGARMAN: Yes, your Honor.

THE COURT: Certainly there is a motion for [41] summary judgment. If you make a representation to me that you need discovery to counter that motion, I think I would be obliged to look at it very closely.

MR. SUGARMAN: Your Honor, I would like to again call to the Court's attention that the defense of laches is to be weighed among all of the merits of the case.

THE COURT: I understand that.

MR. SUGARMAN: It can't be decided as a single issue.

THE COURT: I am not going to decide that in this case now today. I am not going to decide that.

MR. SUGARMAN: My only point as to discovery, in order for the laches issue to be disposed of properly, the entire merits of the case have to be heard because laches cannot be disposed of in isolation from the merits of the case.

In order for the merits of the case to be disposed of, I have to have discovery on the merits of the case. Therefore, since the presumption that Judge Latchum started with is wrong, namely that laches can be disposed of independently of the other issues in the case, it is inappropriate to deny discovery on all of the other issues in the case in order to resolve the laches issue.

Therefore, I do renew my request which I made to Judge Latchum for discovery on the merits.

[42] MR. HERRMANN: Your Honor, two points.

One, to the extent the response is due June the 11th, there is appropriate Rule 56 affidavits. With regard to the necessity for more discovery, to the extent it hasn't already been allowed, and then I'm sure your Honor would consider that.

The other point, really, your Honor, is that counsel is just wrong. There are numerous cases which we cite endlessly in our brief where the courts have ruled on the issue of laches as a preliminary matter. That's exactly what all our briefs have relied on.

THE COURT: When you talk about laches, you're really talking about one very narrow issue, as I recall, and that is prior knowledge?

MR. JORDAN: And undue prejudice.

THE COURT: Undue prejudice?

MR. JORDAN: Yes, your Honor.

THE COURT: With regard to those two issues, I would allow discovery, assuming that appropriate Rule 56 affidavit is filed. I see no reason to go beyond that, if that's the narrow scope of your laches issue.

MR. SUGARMAN: If I understand your Honor's ruling, and maybe your Honor didn't intend it, your Honor is narrowing the discovery that Judge Latchum allowed. He allowed us discovery on the laches issue without filing an [43] affidavit under Rule 56(e).

MR. HERRMANN: The only reason I mentioned the Rule 56(e) affidavit, your Honor, is only to the extent that Mr. Sugarman somehow wishes to present further in his brief the necessity for merits discovery in order to resolve what we think is a limited issue.

THE COURT: If he wants to have discovery with regard to the summary judgment motion, I will allow it. He has got to follow the rules like everybody else does.

And the discovery is limited to the very narrow scope of your laches issue, those two items that you just described. And the decision will be made on those two very narrow issues and nothing else, because I am limiting his discovery.

* * * * *

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

Civil Action No. 90-150 LON

FRANK E. ACIERNO, INDIVIDUALLY AND AS TRUSTEE AD LITEM FOR RESIDENTS AND TENANTS, PLAINTIFF

v.

SAMUEL SKINNER, Individually and in his capacity as Secretary, U.S. Department of Transportation; JOHN DAVIS, Individually and in his capacity as Director of the Highway Division, Delaware Department of Transportation; MANUEL MARKS, Individually and in his capacity as Division Administrator, Federal Highway Administration; THOMAS D. LARSON, Individually and in his capacity as Federal Highway Administrator; RONALD C. CARMICHAEL, Individually and as Delegee, Federal Highway Administrator, DEFENDANTS

Wilmington, Delaware
Monday, June 4, 1990
10:30 o'clock a.m.

Before: HONORABLE JOSEPH J. LONGOBARDI, Chief Judge

---

[2] Appearances:

STEPHEN B. POTTER, ESQ., and
PAUL PTAK, ESQ.
Potter, Spiller, Crosse & Leonard

-and-

ROBERT J. SUGARMAN, ESQ., and
JAMES NEILL, ESQ.
(Philadelphia, PA)
Counsel for Plaintiff

KENT A. JORDAN, ESQ.
Assistant United States Attorney

-and-

JAMES SCOUTEN, ESQ.
Office of Regional Counsel
Federal Highway Administration
(Baltimore, MD)
Counsel for Federal Defendants

FREDERICK H. SCHRANCK, ESQ.
Delaware Department of Transportation
Counsel for State Defendants

STEPHEN E. HERRMANN, ESQ.
Richards, Layton & Finger
Counsel for Defendant-Intervenor

* * * * *

[14] THE COURT: Okay. With regard to any misunderstanding about what is going to happen on June 20th, there will be an oral argument on the motions by the defendants. It will not be a hearing. It will be oral argument.

With regard to the scope of discovery, discovery is limited to dealing with the issues raised by the parties. Obviously, briefing on the issue is designed to bring to the Court all of the information available by the plaintiffs which might be pertinent in response to the defendants' motions. Discovery after that time would serve no useful purpose either to the Court or to the plaintiffs.

Under these circumstances, the discovery will be cut off sometime prior to the filing of the brief on June 11.

However, upon request of the plaintiffs, the Court would give them additional time to conduct discovery and thereby move the oral argument date from June 20 to some later time.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45083